IN THE

SUPREME COURT OF THE UNITED STATES

* * *

NO. 75-1384

* * *

**W.J. ESTELLE, JR., DIRECTOR
TEXAS DEPARTMENT OF CORRECTIONS,**
Petitioner

v.

**LAWRENCE RAY ALBERTI,**
Respondent

* * *

# PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

* * *

JOHN L. HILL
Attorney General of Texas

DAVID M. KENDALL
First Assistant

JOE B. DIBRELL
MARIANNE W. CANTRICK
Assistant Attorneys General

Attorneys for Petitioner

P. O. Box 12548
Austin, Texas 78711

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W. J. ESTELLE, JR., DIRECTOR
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* * *

PETITION FOR WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF OF APPEALS
FOR THE FIFTH CIRCUIT

* * *

The Petitioner, W.J. Estelle, Jr., Director of the Texas Department of Corrections, respectfully prays that this Court issue a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit, for the review of their judgment entered December 29, 1975, in the above-entitled cause.

## OPINION BELOW

The opinion delivered by the Court of Appeals is reported at 524 F.2d 1965 (1975); a copy of it is attached to this Petition as Appendix A. The opinion and judgment of the United States District Court for the Southern District of Texas are unreported; copies of them are attached hereto as Appendix B.

should this be 1265?

## JURISDICTION

The judgment of the Court of Appeals was entered on December 29, 1975, and is dated accordingly. The Petitioner herein filed a Motion to File an Out-of-Time Suggestion for Rehearing En Banc on February 19, 1976; that motion was denied by order of the Court of Appeals on March 1, 1976.

This Court has jurisdiction to grant a writ of certiorari pursuant to the provisions of 28 U.S.C. §1254(1).

## QUESTION PRESENTED FOR REVIEW

The sole question presented for review herein is whether the respondent (hereinafter defendant) Alberti was "in custody" or "otherwise deprived of his freedom of action in any significant way" at the time he made an incriminating statement to police officers, and hence constitutionally entitled to exclude the statement at his later trial because he had not before he made it been given the warnings formulated in *Miranda v. Arizona*, 384 U.S. 436 (1966).

## CONSTITUTIONAL PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution provides, in pertinent part:

> No person . . . shall be compelled in any criminal case to be a witness against himself . . .

The Sixth Amendment to the United States Constitution provides, in pertinent part:



> In all criminal prosecutions, the accused shall enjoy the right . . . to have the assistance of counsel for his defense.

The Fourteenth Amendment to the United States Constitution provides, in pertinent part:

> No state shall . . . deprive any person of life, liberty, or property, without due process of law . . .

## STATEMENT OF THE CASE

On December 17, 1970, Lawrence Ray Alberti was convicted of the offense of possession of marijuana before a jury in the 179th District Court of Harris County, Texas. The jury assessed his sentence at twenty years confinement. The judgment and sentence of the trial court were appealed to the Texas Court of Criminal Appeals and there affirmed. *Alberti v. State*, 495 S.W.2d 236 (Tex. Crim. App. 1973).

Alberti made application for the writ of habeas corpus to the United States District Court for the Southern District of Texas on July 9, 1973; that court had jurisdiction to entertain his application pursuant to 28 U.S.C. §§2241 and 2254. His application was denied without a hearing on December 20, 1974. The Court of Appeals for the Fifth Circuit reversed the decision of the district court on December 29, 1975, holding that the writ should have been granted, and entered judgment accordingly. The Court of Appeals stayed the issuance of its order as a mandate until February 26, 1976; the stay was later extended by order of the Court of Appeals until March 28, 1976, with the provision that the stay should continue until disposition of the cause by this Court if a petition for writ of certiorari should be filed before that date.

## STATEMENT OF FACTS

The material facts are set forth in the opinion of the Court of Appeals; they are uncontroverted. A reliable confidential informant told officers of the Houston Police Department that the defendant Alberti could be found in a particular apartment at that moment in possession of a large quantity of marijuana, and that he would be at the location for only a short time. The officers, aware of the urgency of the situation, proceeded to the location without an arrest or search warrant. On arriving at the apartment they knocked on the door, which was opened by the defendant Alberti. When the officers asked to speak to "Lawrence", the defendant identified himself as "Lawrence" and invited the officers to enter the apartment; four other adults and some children were within. Once in the apartment, one of the officers observed a shoebox containing a number of plastic bags that held a greenish plant substance. The box was in plain view, as the defendant Alberti does not deny. The officer opened one of the bags and inquired to whom it belonged. Alberti responded that the box was his and that the other occupants of the apartment had no connection with it, whereupon he was arrested and admonished of his rights pursuant to *Miranda v. Arizona*, 384 U.S. 436 (1966). The greenish substance proved upon analysis to be marijuana. Alberti's statement that he owned the substance was related to the jury at his trial, and he was convicted of possession of marijuana.

In seeking a writ of habeas corpus from the district court below, Alberti argued that his admission to ownership of the bagged substance should have been excluded from evidence at his trial because he had not been warned of his *Miranda* rights before making it.



The district court did not accept this contention, observing that *Miranda* requires that warnings be given only when a suspect is "in custody" or its equivalent and ruling that Alberti was not in custody at the time he made the admission. The Court of Appeals, finding that Alberti was functionally in custody from the moment the police officer discovered the bagged substance, held that his admission was the product of a custodial interrogation and therefore constitutionally inadmissible since it was not preceded by proper warnings.

## REASONS FOR GRANTING THE WRIT

### 1. The Court of Appeals for the Fifth Circuit has rendered a decision in conflict with decisions of other Courts of Appeals on the same matter.

In deciding that the defendant Alberti's admission to ownership of the bagged substance was the product of "custodial interrogation" and hence improperly admitted into evidence, the court below adopted a much more expansive theory of "custody" than have other Courts of Appeals. For example, in *United States v. Irion*, 482 F.2d 1240 (9th Cir. 1973), *cert. denied*, 414 U.S. 1026 (1973), the Court of Appeals for the Ninth Circuit had before it these circumstances: Customs Agents obtained information that duffel-bag type packages had been removed from a boat and placed in an automobile surreptitiously, that the boat had come from Mexico without passing through Customs, that Irion had been on the boat, and that an automobile similar to the vehicle in question was rented to Irion and parked outside a motel room that he had rented. They knocked at the door of the room and were admitted, whereupon they observed several duffel bags leaning

against the wall. The agents then asked Irion if he had any items to declare to Customs; he replied "Nothing of any value." They then asked him if they could see the objects that had been removed from the boat, and he pointed to the duffel bags, stating "There they are." The Court of Appeals held that the statements were admissible even though Irion had not been warned before making them, because he was not in "custody" or its functional equivalent. Yet no possible factual distinction can be made between *Irion* and the instant case.

In the *United States v. Cowley*, 452 F.2d 243 (10th Cir. 1971), police officers went to a home to investigate a report that Cowley was intoxicated and had a sawedoff shotgun in his possession. On arriving. they saw him throw what appeared to be a rifle into the bushes and return to the house. The police believed the trouble to be only a "family dispute" and asked Cowley to leave the house, but as he began to leave they were told anew that he had had a gun and were shown a box of shells. They then questioned Cowley, who at first denied but then admitted to having had the gun. The Court of Appeals for the Tenth Circuit held that there had been no custodial interrogation.

In *United States v. Bell*, 464 F.2d 667 (2d Cir.) *cert. denied*, 409 U.S. 991 (1972), the defendant was "patted down" by police after being selected as a potential hijack suspect by an airline official trained to recognize such persons, activating the airline's magnetometer twice, and volunteering the information that he had just been released from the Tombs on bail for murder and narcotics offenses. The pat-down revealed hard objects about four or five inches long wrapped in brown paper bags. The defendant's description of the objects as "candy for his mother" was admitted at his trial even though he had not been *Miranda*-warned before giving



it, and the Court of Appeals for the Second Circuit held that "at this stage there was no obligation to give such warnings." 464 F.2d at 674.

The defendant in *United States v. Tobin*, 429 F.2d 1261 (8th Cir. 1970), was driving an automobile with expired California out-of-state license plates when he was stopped by a police officer. In response to the officer's request, he produced a registration document that had the earmarks of a forgery. He told the officer that the car was wedding gift, and repeated this story at the police station, after he had followed the officer there for a check on whether the vehicle was stolen. The Court of Appeals for the Eighth Circuit ruled that the circumstances did not consitute a custodial interrogation, and hence that the defendant's statements were properly admitted at his trial.

Several other recent Court of Appeals decisions, similar on their facts to the instant case, have found no custodial interrogation. *E.g.*, *United States v. Omirly*, 488 F.2d 353 (4th Cir. 1973); *Unite States v. Belperio*, 452 F.2d 389 (9th Cir. 1971); *United States v. Hall*, 421 F.2d 540 (2d Cir. 1969), *on rehearing*, 459 F.2d 454 (2d Cir. 1972).

In summary, the Court of Appeals for the Fifth Circuit has decided the instant case in a way that cannot be reconciled with law in other circuits. This Court can and should resolve the conflict by granting this petition for the writ of certiorari.

**2. The Court of Appeals for the Fifth Circuit has decided an important question of federal law that should be, but has not been, decided by this Court.**

This Court has had occasion only twice since *Miranda* to discuss the meaning of its language therein concerning "custodial interrogation". In *Mathis v. United States*, 391 U.S. 1 (1968), the defendant was in prison serving a sentence for another offense at the time he answered a revenue agent's questions. In holding that the questioning was "custodial", this Court merely acknowledged that formal custody--such as arrest or imprisonment--is alone sufficient to require the administration of *Miranda* warnings prior to any questioning. In *Orozco v. Texas*, 394 U.S. 324 (1969), this Court established that formal custody, although sufficient to invoke the protections of *Miranda*, is not necessary to their application; and individual may, even in his own home, be placed in such coercive surroundings that *Miranda* warnings are required.

In the absence of more specific guidance from this Court, the Courts of Appeals have adopted widely varying standards to measure the extent of "custody" or its equivalent in particular situations. *See* Note, *The United States Courts of Appeals: 1971-72 Term, Criminal Law and Procedure*, 61 GEO. L.J. 275, 340 (1972) ("Apparently, confusion in this area of the law is widespread. . . ."). Accordingly, this Court should speak on this important question of constitutional criminal procedure and clarify the law for the benefit of both the bewildered police officer and the beleaguered lower court.



## CONCLUSION

For the reasons stated above, the Petitioner Estelle prays that this Court grant his Petition for the Writ of Certiorari.

Respectfully submitted,

JOHN L. HILL
Attorney General of Texas

DAVID M. KENDALL
First Assistant

JOE B. DIBRELL
Assistant Attorney General

Marianne Wesson Cantrick

Attorneys for Petitioner

P. O. Box 12548
Austin, Texas 78711

## PROOF OF SERVICE

I, Joe B. Dibrell, Jr., a member of the Bar of the Supreme Court of the United States, do hereby certify that three copies of the foregoing Petition for Writ of Certiorari have been served on the attorney of record for the Respondent Alberti by placing the same in the United States Mail, certified postage prepaid, addressed as follows: Michael Anthony Maness, Esq., 5959 West Loop South, Suite 606, Bellaire (Houston), Texas, 77401, on this the _____day of April, 1976.

_____

*Joe B. Dibrell, Jr.*

APPENDIX A

Lawrence Ray Alberti,
Petitioner-Appellant

v.

W.J. Estelle, Jr., Director
Texas Dept. of Corrections
Respondent-Appellee.

No. 75-2253

United States Court of Appeals
Fifth Circuit

Dec. 29, 1975

Appeal from the United States District Court for the Southern District of Texas

Before TUTTLE THORNBERRY and COLEMAN, Circuit Judges.

INDEXED

COLEMAN, Circuit Judge.

Lawrence Ray Alberti appeals the denial of habeas corpus relief from a Texas state sentence. We reverse.

On June 4, 1970, about 3:30 p.m., officer Bernard D. Jackson, narcotics division of the Houston Police Department, received a telephone call from an unnamed confidential informant who had provided reliable information on at least two previous occasions. The informant stated that Lawrence Ray Alberti could be found in Apartment 252 of the Gulfland Apartments on Rustic Lane in Houston, that he would have in his possession of large quantity of marihuana and LSD for use and sale, and that he would be there for only a short period of time.

Accompanied by fellow narcotics officers Garcia and O'Briant, officer Jackson proceeded directly to the named apartment, arriving there approximately twenty minutes after receipt of the call. Concluding that the urgencies of time would not permit it, the officers did not stop to obtain a search or arrest warrant.

The officers knocked on the apartment door. It was opened by Alberti. The officers asked if they could speak with "Lawrence". Petitioner responded, "I am Lawrence. Come on in". The three officers then entered the living room of the apartment, displaying their official identifications as they entered. In addition to Alberti, there were four other adults and some children in the apartment.

Once inside the apartment, officer Jackson observed a shoebox on a bar approximately ten to twelve feet directly in front of the door, containing what appeared to be stacks of plastic bags with a greenish plant substance inside. Jackson walked over to the shoebox, opened one of the bags, and asked who it belonged to. Alberti responded that it was his and that the rest of the people in the apartment were not involved in it. It was not until then that Alberti was arrested and given the *Miranda* warnings.[1]

He was then asked if there was any more in the apartment that he knew of. He replied that there was and directed officers to a refrigerator from which he removed a glass containing some ninety odd cellophane wrapped packages of pills, later determined to be LSD, and two needles and syringes.

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1. *Miranda v. Arizona*, 1966, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694.



On December 17, 1970, after a jury trial, Alberti was convicted of the possession of marihuana and sentenced by the jury to twenty years in prison. On direct appeal, the Texas Court of Criminal Appeals affirmed. *Alberti v. State*, Tex. Cr.App., 1973, 495 S.W.2d 236. Subsequently, after fully exhausting available State remedies, Alberti filed his application for federal habeas corpus relief on July 9, 1973. The Court reviewed the record and denied Alberti's application without a hearing.

Alberti appeals, urging that evidence of his self-incriminating response to the inquiry of the officers was erroneously admitted in violation of *Miranda v. Arizona*, 1966, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694, and *Brown v. Beto*, 5 Cir., 1972, 468 F.2d 1284.

In *Miranda* the Supreme Court held that "the prosecution may not use statements, whether exculpatory or inculpatory, stemming from custodial interrogation of the defendant unless it demonstrates the use of procedural safeguards effective to secure the privilege against self-incrimination", 384 U.S. at 444, 86 S.Ct. at 1612.

Alberti contends that his answer to officer Jackson's query as to who the marihuana belonged to was the product of "custodial interrogation", hence inadmissible.

*[1]* What it takes to amount to "custodial interrogation" has given the state and federal courts no small amount of difficulty. *Miranda*, of course, tells us that "custodial interrogation" means "questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way", 384 U.S. at 444, 86 S.Ct. at 1612. This definition enunciates no hard and fast concept of "custody". This Court, therefore, has adopted the judicial approach of deciding the

issue on a case-by-case basis, *United States v. Carollo*, 5 Cir., 1975, 507 F.2d 50; *Brown v. Beto*, 5 Cir., 1972, 468 F.2d 1284; *United States v. Phelps*, 5 Cir., 1971, 443 F.2d 246; *United States v. Montos*, 5 Cir., 1970, 421 F.2d 215.

*[2]* We have attributed special significance to four factors: (1) probable cause to arrest, (2) subjective intent of the police, (3) subjective belief of the defendant, and (4) focus of the investigation, *Carollo, supra*, 507 F.2d at 52; *Brown, supra*, 468 F.2d at 1286; *Phelps, supra*, 443 F.2d at 247; *Montos, supra*, 421 F.2d at 223.[2]

Although previous cases have stated that the focus-of-investigation factor is the most compelling,[3] the recent case of *United States v. Carollo, supra*, clearly holds that this factor alone is not enough to create a custody situation. In *Carollo* the Court pointed out that probable cause to arrest had existed in all the cases where the focus factor was considered important, thus implying that focus without probable cause is insufficient to establish "custody".

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2. Compare the "objective reasonable man" factors employed by the Ninth Circuit to determine whether a person is in custody; the language used to summon the suspect; the physical surroundings of the interrogation; the extent to which the suspect is confronted with the evidence of his guilt; and pressure exerted to detain him, *United States v. Luther*, 9 Cir., 1975, 521 F.2d 408, 410.

3. *See, e.g., Brown v. Beto*, 5 Cir., 1972, 468 F.2d 1284, 1286; *United States v. Phelps*, 5 Cir., 1971, 443 F.2d 246, 247-48; *Bendelow v. United States*, 5 Cir., 1969, 418 F.2d 42, 47.



The case most heavily relied on by Alberti is *Brown v. Beto, supra*. The District Court found *Brown* distinguishable on its facts, and we think this was correct. We feel constrained to reverse, however, on the basis of two previous decisions of this Court, *United States v. Phelps*, 5 Cir., 1971, 443 F.2d 246, and *Agius v. United States*, 5 Cir., 1969, 413 F.2d 915.

In *Phelps*, Alcohol, Tobacco & Firearms agents and local police officers went to the defendant's place of business to determine if he had complied with the record keeping provisions of certain federal firearms legislation. The officers immediately upon entering noticed a weapon in a showcase which appeared to be an illegal weapon. Phelps subsequently made some incriminating statements to the officers. The Court spoke to the issue of whether Phelps was in custody within the meaning of *Miranda* as follows:

> [I]f the investigation was not focused on the defendant when the officers entered the building, it certainly focused on him a few seconds later when the investigators discovered the illegal weapon in the showcase. We think that the presence of four officers in a man's place of business holding a weapon which they discovered on the premises and which they have announced is illegal, presents a situation which is intimidating enough to warrant the application of the *Miranda* privileges and protections. The investigators had probable cause to arrest Phelps, and he had reason to believe that they would do so. Once the officers found the illegal weapon the investigation focused on Phelps, and the panoply of rights enunciated in *Miranda* became applicable. 443 F.2d at 248.

In *Agius*, the defendant was being investigated concerning the robbery of a saving and loan association because of his resemblance to pictures of the culprit taken during the robbery by a hidden camera. The defendant claimed that he could produce people who could vouch for his whereabouts the afternoon of the robbery and went to his car to locate a paper containing the address of one of these persons. While the defendant was rummaging through his car looking for this paper, the investigating agents noticed a toy gun in the glove compartment. The agents questioned the defendant concerning the presence of the gun and he made some incriminating responses. The Court discussed the question of whether the defendant was "in custody" at the time of the agents questioning in the following language:

> *[I]*t is clear that appellant was deprived of his freedom of action in a significant way at least immediately after the agents saw the toy gun in his car. Assuming that prior to that time the questioning was non-custodial and investigatory, it is beyond the capacity of a reasonable mind to suppose appellant was "free to go" after the discovery of the gun, viewed from whatever standpoint. The discovery of the gun, along with the resemblance between Appellant and the robber, established probable cause and focused the identification. It must have made clear to both agents and appellant that the latter was going to be detained unless and until the investigation was clearly to take a different direction. The adversary process had, at least at that point, begun. Thus, the trial court's findings regarding the admissibility of the statements made by appellant as a result of questioning initiated by the agents in an attempt to explain the presence of the gun are clearly erroneous. 413 F.2d at 918-19.



*[3,4]* In the instant case the confidential informant had provided the officers with only the name of Lawrence Alberti. The officers at the door of the apartment asked to speak with "Lawrence", whereupon petitioner identified himself as Lawrence and invited the officers in. The officers saw the contraband, asked who it belonged to, and Alberti incriminatingly responded. The discovery of the marihuana, coupled to the information provided by the informant, established probable cause and focused the investigation on Alberti. Before being questioned he should have been given the *Miranda* warnings. His admission in response to the question should not have been admitted at trial. Alberti's statements concerning the location of other narcotics obtained after the benefit of a *Miranda* warning would also be inadmissible as tainted by the prior illegal confession.[4] *See Randall v. Estelle*, 5 Cir., 1974, 492 F.2d 118.

We candidly state that if we were writing on a clean slate we would likely hold that the circumstances of this case were not so compulsive as to infringe upon *Miranda* objectives. Nevertheless, the cited cases require reversal. Bound by those precedents, we follow them.

The denial of the habeas corpus petition by the District Court is hereby

Reversed.

TUTTLE, Circuit Judge (concurring specially):

I concur in the judgment of the court and in all that is said in the opinion except for the penultimate paragraph.

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4. The record reveals that the indictment of Alberti in the instant case charged him only with possession of marihuana. It makes no mention of LSD or other narcotics. Record of Trial, p. 4.

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

* * *

October Term, 1975

* * *

No. 75-2253

* * *

D.C. Docket No. CA-73-H-950

LAWRENCE RAY ALBERTI,
Petitioner-Appellant,

versus

W.J. ESTELLE, JR., Director
Texas Dept. of Corrections,
Respondent-Appellee.

Appeal from the United States District Court for
the Southern District of Texas

Before TUTTLE, THORNBERRY and COLEMAN,
Circuit Judges.

J U D G M E N T

This cause came on to be heard on the transcript of the record from the United States District Court for the Southern District of Texas, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the order of the District Court appealed from, in this cause be, and the same is hereby, reversed.

December 29, 1975

TUTTLE, Circuit Judge, concurring specially.

Issued as Mandate:

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

| | | |
|---|---|---|
| LAWRENCE RAY ALBERTI, Petitioner, | I | |
| V. | I | CIVIL ACTION NO. 73-H-950 |
| W.J. ESTELLE, JR., Director, Texas Department of Corrections, | I | |
| Respondent. | I | |

Michael Anthony Maness, Houston, Texas, for petitioner.

John L. Hill, Attorney General of Texas, Calvin Botley, Assistant Attorney General of Texas, Houston, Texas, for respondent.

FINAL JUDGMENT

After due consideration of the pleadings filed as a matter of record in this case, it is the opinion of this Court that the application for writ of habeas corpus must be, and it hereby is, denied. Accordingly, this cause is dismissed.

DONE at Houston, Texas, this 20th day of December, 1974.

/s/
Carl O. Bue, Jr.
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

| | | |
|---|---|---|
| LAWRENCE RAY ALBERTI, | X | |
| | X | |
| Petitioner, | X | |
| | X | |
| V. | X | CIVIL ACTION |
| | X | NO. 73-H-950 |
| W.J. ESTELLE, JR., | X | |
| Director, Texas | X | |
| Department of | X | |
| Corrections, | X | |
| | X | |
| Respondent. | X | |

Michael Anthony Maness, Houston, Texas, for petitioner.

John L. Hill, Attorney General of Texas, Calvin Botley, Assistant Attorney General of Texas, Houston, Texas, for respondent.

**MEMORANDUM AND ORDER**

Petitioner was convicted by jury of the offense of possession of marijuana and was sentenced by the jury to a term of imprisonment for 20 years. State of Texas v. Alberti, Cause No. 152,774 (179th Judicial District Court, Harris County, Texas, December 17, 1970). The conviction was affirmed on direct appeal. Alberti v. State of Texas, 495 S.W.2d 236 (Tex. Crim. App. 1973).

Petitioner has filed this application for writ of habeas corpus. He proffers three grounds as supporting his request for relief: (1) illegal search and seizure resulting in the discovery of marijuana; (2) improper request for custodial confession without first giving petitioner the



Miranda warnings; and (3) invalid impanelling of grand and petit juries by virtue of the alleged exclusion of those potential jurors who do not believe in a supreme being. See Petitioner's Brief in Support of the Application for Writ of Habeas Corpus (October 21, 1974).

Respondent raises the threshold question of failure to exhaust state remedies. Upon examination of the pro se brief filed by petitioner before the Court of Criminal Appeals, this Court concludes that petitioner has exhausted state remedies. Jurisdiction is proper in this Court pursuant to 28 U.S.C. §2254. For the reasons stated herein, this Court further concludes, on the merits, that petitioner's application should be, and it hereby is, denied. The petition is dismissed.

FACTS[1]

At about 3:30 p.m. on June 4, 1970, an officer of the Houston Police Department Narcotics Division received a "tip" from a confidential informant, previously used by the Department, that the officer should proceed quickly to the Gulfland Apartments in Houston, Texas. The informant further stated to the officer that Lawrence Alberti (petitioner) would be found in apartment 252 of that apartment complex, and that he would have a large quantity of marijuana and LSD in his possession for sale and use. The informant emphasized the need for haste to the officer, stating that Alberti was planning to leave the premises within a short time.

Accompanied by two other officers, the police officer who received the call proceeded directly to the apartment location described by the informant, arriving between 3:50 and 4:00 p.m. The officers had no search or arrest warrants with them, having concluded that there was not sufficient time to procure these before proceeding. Arriving at apartment 252, the officers knocked on

the door. Petitioner answered the door and when asked by the officers if they could speak with Lawrence, replied: "I am Lawrence. Come on in." The officers then entered the living room, displaying their police credentials as they were entering the apartment.[2]

Once inside the apartment, the officer who had received the informant's call noticed a shoebox sitting on a bar approximately 10 to 12 feet away and directly in line with the front door, containing what appeared to be stacks of plastic bags. The box and its contents were clearly visible from the front of the apartment. The officer walked over to the shoebox, examined its contents, opened one of the bags and asked who it belonged to. Petitioner indicated that the box belonged to him, and that none of the other occupants of the apartment were involved.

At this point, according to petitioner, the officer arrested petitioner and advised him of his Miranda rights. Petitioner was then asked whether there were any more drugs in the apartment, at which point petitioner directed the officers to the icebox where several packages of pills and two syringes with needles were found.

PETITIONER'S CONTENTIONS

Petitioner raises two contentions regarding these events: an illegal search; and illegally obtained statements from petitioner. After careful consideration of the transcripts, briefs and applicable Supreme Court and Fifth Circuit rulings, this Court concludes that both of these contentions must fall.

SEIZURE OF THE MARIJUANA:
"PLAIN VIEW" DOCTRINE

This Court agrees with respondent's contention that the contraband, in this case the plastic bags protruding up from the shoe box on the bar,



was in "plain view" of the officer. Walking over to inspect such contraband was therefore justifiable,[3] Adams v. Williams, 407 U.S. 143 (1972), and the search was lawful and in conformity with Fourth Amendment standards. Thus, seizure of the marijuana was permissible, as was introduction of the marijuana as evidence at trial.

INCULPATORY STATEMENTS BY PETITIONER:
CUSTODIAL INTERROGATION

Petitioner vigorously contends that the police induced petitioner to make inculpatory statements without first warning him of his right to remain silent and, in support of this contention, relies heavily on the holding of the United States Court of Appeals for the Fifth Circuit in Brown v. Beto, 468 F.2d 1284 (5th Cir. 1972). In that case, the panel found that, considering the totality of the circumstances, the confession made by the defendant there occurred after he had been placed in custody so that admission of his confession was erroneous. 468 F.2d at 1286. Of course, the presence of custodial interrogation versus non-custodial interrogation is significant to determine whether a suspect must be read his rights initially as prescribed by Miranda v. Arizona, 384 U.S. 436 (1966), prior to his being interrogated.

Viewing the totality of the circumstances, this Court concludes that petitioner's contention must fail, and the statements he made in response to the questions asked by the policeman before he was arrested are admissible. Brown v. Beto involved a situation where the police had obtained a search warrant, had focused their attention solely on the defendant and then had come to his drugstore and conducted a 30-to-45 minute search of the premises in his presence. Under such obvious circumstances, the Fifth Circuit's holding that Brown was "in custody" at the time of his interrogation was inescapable.

Here, the facts are very different. Indeed, the facts are much closer to United States v. Hall, 493 F.2d 904 (5th Cir. 1974). In that case, a person had called the Federal Bureau of Investigation (FBI) office in Miami, Florida. He stated that he was going to kill President Nixon, identified himself by name and gave his address at a trailer park in Miami. Later that morning, an agent of the Secret Service investigated the call after having been informed of the name and location of the caller by the FBI. Upon arriving at the trailer park, the agent proceeded to the door of the designated trailer, identified himself, and asked the man who answered the door if he was named "Joseph Morris Hall"--the name previously given to the FBI. The person at the door said he was indeed "Joseph Morris Hall" and, when asked if he was the person who had contacted the FBI earlier that morning, Mr. Hall responded that he was. 493 F.2d at 904-05. He was thereupon placed under arrest, taken to jail and read his rights. He waived his Miranda rights and made a statement indicating that he had threatened the life of President Nixon earlier in the telephone call to the FBI. Id.

On such facts, the Fifth Circuit concluded that Hall was not in custody at the time he answered the agent's question about his identity and about which had earlier called the FBI. The appellate court further held that the statements were admissible in prosecution for making an oral threat to kill the President, even though Hall had not been warned previously of his right to remain silent. Subsequent custodial statements were not inadmissible on the theory that they were tainted by the prior statements. Id. at 905.

This Court finds the Hall rationale applicable to the facts of this case. When the police officers arrived at apartment 252, they were not aware who "Lawrence" was, nor whether "Lawrence" who answered the door was the same person as Lawrence Alberti. They were permitted to enter by petitioner and thereupon properly identified themselves.



As petitioner has pointed out, see note 2, supra, the officers had no real reason to suspect petitioner of possession of marijuana beyond what had been supplied to them via the informant.

On these facts, this Court cannot conclude that petitioner was in custody either at the time he was asked his name, or when asked to whom the shoebox of marijuana belonged. Petitioner's statements that the box belonged to him and that no one else was involved were therefore sufficiently inculpatory to merit his being placed under arrest. When he was then in custody, his rights were read to him in accordance with Miranda standards. The statements made by petitioner before he was arrested were therefore properly admissible as evidence at his trial. Petitioner's contention on this point cannot stand.[4]

Petitioner further arges that the confession and the contraband should not be admissible because the testimony of the officers can be shown to be false. Petitioner does not allege directly that the officers perjured themselves when testifying out of the presence of the jury before the trial judge; rather, petitioner contends that their testimony should be viewed in light of their subsequent indictment by a federal grand jury for certain activities they allegedly engaged in while serving in the narcotics division. See Petitioner's Application for the Writ of Habeas Corpus at 13 (October 21, 1974).

This Court cannot agree with such a contention. At petitioner's trial, no evidence was offered to controvert the testimony of the officers. The trial judge evaluated the credibility of the officers after extensive cross-examination by petitioner's counsel. Finally, petitioner, in the brief he submitted to this Court, substantially alleges the same facts as were testified to by the officers and contends only that the officers may now appear to be perjurers, not that their stories would be any different, or that any other

person would offer testimony contradictory to theirs. In such a circumstance, this Court finds petitioner's allegations regarding the officers' testimony to be groundless.

Petitioner's final contention is that the grand and petit juries were improperly impanelled because potential jurors who do not believe in a Supreme Being were allegedly excluded from serving.[5] This contention apparently is grounded upon the allegation that all prospective jurors "must affirm their belief in a Supreme Being as a prerequisite for serving." See Petitioner's Application for the Writ of Habeas Corpus at 14 (October 21, 1974); TEX. CODE CRIM. PROC. ANN. arts. 19.33, 19.34.

The Court finds this contention to be totally without merit. It is difficult to ascertain precisely what prejudice could possibly flow to petitioner as an accused on trial only before persons who have affirmed their belief in a Supreme Being, since petitioner was not on trial for any crime pertaining to religion, nor on trial for a crime which would offend the sensitivities of a particular religious group, nor does he contend that he is a member of a minority group composed of persons who do not believe in a Supreme Being. Still, the Court has proceeded to evaluate the mechanism of Texas jury impanelling as interpreted by the Texas courts.

Such evaluation reveals conclusively to this Court that the procedure of requiring an oath or affirmance is not violative of any constitutional right and, indeed, serves the important due process goal of ensuring that jurors are bound by some oath to perform their duties in a fair, unbiased manner. The Texas Court of Criminal Appeals has recently evaluated the constitutionality of the challenged articles in Craig v. State, 480 S.W.2d 680 (1972). In interpreting the law in question, taken together with applicable state constitutional principles, the Court of Criminal Appeals held that prior



Texas law permitted jurors to affirm rather than be sworn, that the challenged statutes contained no requirement of an expression of belief in a Supreme Being, and that the primary purpose of the statute was to require jurors to affirm under oath their willingness to properly perform the duties of their position.

This Court thoroughly agrees with the validity of this requirement. Article VI, §3 of the Constitution does not apply to this situation, being pertinent only to the circumstance where an alleged religious requirement is used to prevent someone from holding a public office. The First Amendment does not prohibit the use of "so help me God". No person is asked to impinge upon the exercise of his religious beliefs to serve on a jury by this oath; and the State establishes no religion by merely requesting that an oath or affirmance be rendered. Therefore, petitioner's contention is without merit.

With no remaining contentions to be considered, this Court concludes that the application for writ of habeas corpus must be denied and the petition dismissed.

DONE at Houston, Texas, this 20th day of December, 1974.

/s/

Carl O. Bue, Jr.
United States District Judge

FOOTNOTES

1. The pertinent facts set forth here are taken from the recitation of facts provided in petitioner's brief. See Petitioner's Application for the Writ of Habeas Corpus at 23 (October 21, 1974).

2. Petitioner contends, and the evidence does not controvert the contention, that the officers did not know petitioner by sight, did not know who the occupants of the apartment were, and had not observed, heard or smelled anything at the scene which suggested the presence of marijuana or other dangerous drugs before the door was opened. See Petitioner's Brief in Support of the Application for the Writ of Habeas Corpus at 2 (October 21, 1974).

3. As was indicated earlier, the officers were acting on the tip of an informant. The record indicates, and petitioner does not attempt to controvert, that the informant was someone who had previously provided "tips" to the police which had been reliable on at least two occasions. Thus, this Court finds no taint on the decision of the officers to travel to apartment 252 in the Gulfland Apartment complex, and also finds that the officers were in sufficient need to hurry to the location so as to overcome the requirement to procure a search warrant en route.

4. Petitioner has contended that the statements should not be admissible because they were not spontaneously made, but were rather induced from petitioner by the officer's questions. Certainly, in the Miranda setting, as well as when applying the Texas rule of res gestae, the excited, spontaneous, unelicited comments of a suspect present different issues on admissibility. However, on these facts, this Court cannot agree that merely because the



officers were present in the apartment and asked petitioner a question, that his constitutional rights have been violated through some interpretation of the phrase "custodial interrogation".

5. Petitioner's counsel additionally alleges that discriminatory impanelling of the jury occurred because too few non-property owners were included on the rolls from which the panelists were selected. However, this Court will not consider this additional contention since it does not appear ever to have been presented to the state courts in accordance with 28 U.S.C. §2254.